IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
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No. 75-268

HYMAN RADZANOWER,

Petitioner,

v.

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, FIRST NATIONAL BANK OF BOSTON,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIAE

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OPINIONS BELOW

Neither the United States Court of Appeals for the Second Circuit nor the United States District Court for the Southern District of New York rendered any opinion.

JURISDICTION

The judgment of the District Court granting the motion of respondent First National Bank of Boston to dismiss the action as to it for improper venue was entered on October 21, 1974 (App. 89a). The Court of Appeals affirmed that judgment on May 23, 1975 (App. 94a).

Plaintiff below filed a Petition for a Writ of Certiorari with this Court on August 20, 1975, and this Court granted the petition on October 20, 1975. The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Congress intended the venue provision of the Securities Exchange Act of 1934 to repeal the earlier enacted venue provision of the National Bank Act.

STATUTES INVOLVED

The venue provision of the National Bank Act, 12 U.S.C. 94, which derives from the National Banking Act of 1863, 12 Stat. 665, provides:

> Actions and proceedings against any association under this Chapter may be had in any district or territorial court of the United States held within

> the district in which such association may be established, or in any state, county, or municipal court in the county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa, provides:

> The district courts of the United States, and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction over violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal action may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant* * *.

STATEMENT

On July 16, 1974, petitioner instituted a class action in the United States District Court for the Southern District of New York, alleging that the First National Bank of Boston (herein the "Bank") and several other defendants had violated, *inter alia*, the Securities Exchange Act of 1934 in connection with transactions

in the securities of Teleprompter Corporation (App. 1a, 13a-25a). The bank was alleged to have engaged in such violations while conducting banking business in the State of New York (App. 14a).

The petitioner's complaint alleges that the respondent bank had inside information respecting the financial condition of respondent Teleprompter by virtue of its function as lender to Teleprompter (App. 17a-24a). The complaint attempts to develop a Rule 10(b)(5) violation by alleging that the respondent bank had a duty to disclose to the public, the Securities and Exchange Commission or the New York Stock Exchange, the information gained as lender when the respondent Teleprompter made public statements which were in conflict with the information possessed by the Bank. (App. 17a-24a). The bank is not alleged to have engaged in any transactions in the subject security or profited from any transaction in the security or to have had communication or contact with petitioner, either in New York or elsewhere.

Jurisdiction for the action was based on Section 27 of the Securities Exchange Act, 15 U.S.C. 78aa (App. 14a). The Bank moved in the District Court to dismiss the action as to it on the ground that, as a national banking association organized under the National Bank Act, it may be sued only in the judicial district in which it was "established", 12 U.S.C. 94[1] (App. 59a).

[1] Plaintiff had opposed that motion on the ground that the Bank had waived the venue provisions of the National Bank Act by doing business in New York and by designating the New York Superintendent of Banks to receive service of process for it in connection with that business, as required by New York Law, but the District Court found that there was no waiver.

The District Court agreed that venue was not proper in New York, and dismissed the action as to the Bank. The District Court was not asked to pass on the question before this Court; the only question which petitioner asked the District Court to decide was whether or not the bank had waived its venue privilege under 12 U.S.C. § 94 (App. 75a-78a; App. 83a-88a; App. 89a). On May 23, 1975, the Court of Appeals, after oral argument on behalf of the respective parties, affirmed the District Court's decision from the bench, without opinion.

INTEREST OF THE COMPTROLLER OF THE CURRENCY

The Comptroller of the Currency (hereinafter the "Comptroller") has specific bank supervisory responsibility over all national banks, including respondent First National Bank of Boston. The Comptroller's supervisory responsibility includes the periodic examination of all national banks and the approval or disapproval of applications to charter new national banks.

National banks have sought their charters and operated upon the assumption that they could be sued only in accordance with 12 U.S.C. § 94. The Comptroller believes that if this legislatively granted privilege is to be repealed, it should be done only by Congress after consideration of all the policy implications involved, and not done by the courts through an inappropriate application of the doctrine of implied repeal. Such use of the doctrine of implied repeal could establish an unfortunate precedent in respect to other potential conflicts between the National Bank Act and the Securities Acts.

SUMMARY OF ARGUMENT

Nothing in the legislative history of the Securities Acts suggests that Congress intended the venue provision of the Securities and Exchange Act of 1934 to supersede the venue provisions applicable to national banks, 12 U.S.C. § 94. On the contrary, Congress seems to have dealt with securities problems relating to banks by other specific statutory provisions related to banks, such as the separation of investment banking and commercial banking found in the Glass-Steagall Act and the margin requirements found in the Securities Exchange Act of 1934, 15 U.S.C. § 78g and h. Banks' securities and banks themselves were given specific exemptions both in the 1933 and 1934 Securities Acts.

There is no reason, in the absence of specific congressional intent, to find that the venue provision of the Securities Exchange Act of 1934 repeals that of the National Bank Act. All substantive provisions of the Securities Acts still can be given effect even though the National Banks Act's venue provision is upheld. Thus, under the standards enunciated by this Court in *Posadas v. National City Bank*, 296 U.S. 497 (1936) and *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the later-enacted general venue provision of the 1934 Securities Act does not repeal the earlier specific provision governing litigation against national banks.

ARGUMENT

THE VENUE PROVISION OF THE SECURITIES EXCHANGE ACT OF 1934 DOES NOT REPEAL, EITHER EXPRESSLY OR BY IMPLICATION, THE VENUE PROVISION OF THE NATIONAL BANK ACT.

A. Application of This Court's Recently Reaffirmed Standard for Implied Repeal Demonstrates that this Doctrine is Inappropriate to the Case at Bar.

The Securities and Exchange Commission argues in its *amicus* brief to this Court that the venue provisions of the Securities Exchange Act repeal *pro tanto* the earlier enacted venue provisions of the National Bank Act to permit a suit against a national bank charged with a securities law violation in the district where the sale is alleged to have occurred. This argument has been accepted by the Third Circuit. *Ronson Corp. v. Liquifin Aktiengesellschaft*, 483 F.2d 852 (3rd Cir. 1973). This same argument has been rejected by the Second and Ninth Circuits, *Bruns-Nordeman & Co. v. American National Bank & Trust Co.*, 394 F.2d 300 (2nd Cir.), *cert. denied*, 393 U.S. 855 (1968), *United States National Bank v. Hill*, 434 F.2d 1019 (9th Cir. 1970). The Comptroller believes that the result reached by these latter two courts is better reasoned.

It is, of course, plain that there is no express repeal of 12 U.S.C. § 94 by the Securities Acts. Moreover, the application of the canons of statutory construction does not support the contention that the venue provisions of the National Bank Act have been repealed by implication by the later enacted venue provisions of the Securities Exchange Act of 1934.

The classic statement of the rule regarding repeals by implication appears in this Court's decision in *Posadas v. National City Bank*, 296 U.S. 497 (1935). In that case, which upheld the inapplicability of a territorial tax on a national bank on the ground that it would amount to a tax on the sovereign, the Court declared:

> The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication – (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. *But, in either cases, the intention of the legislation to repeal must be clear and manifest;* otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment. [Emphasis supplied.]

296 U.S. 497 at 503. Similarly, in *United States v. Borden Co.*, 308 U.S. 188 (1939), this Court reiterated the requirement that to find a repeal by implication the "intention of the legislature to repeal 'must be clear and manifest.' " 308 U.S. 188 at 198.

Applying the standards from *Posadas*, it is clear that the venue provisions of the securities laws were not intended by Congress as a substitute for the venue provisions of the National Bank Act.

First, an examination of the language and legislative history of the Exchange Act does not disclose any expression by Congress or other manifestation which

would support a finding that Congress intended the venue provisions of the Securities laws to constitute a repeal of the earlier enacted venue provisions of the National Bank Act.[2]

Second, the statutes deal with entirely different subject matters. While the venue provisions of the Securities Acts are special as compared with the general venue provisions regarding suits in the federal courts (*see* 28 U.S.C. § 1391, *et seq.*), the language is expressed in general terms as being applicable to defendants. On the other hand, the provisions of 12 U.S.C. § 94, which antedate the securities laws, specifically limit suits against national banks to the district in which the bank was established.

The enactment of a general law broad enough in its scope and application to cover the field of operation of a special or local statute usually does not repeal a statute which limits its operation to a particular phase of the subject covered by the general law, or to a particular locality within the jurisdictional scope of the general statute.[3] This general rule was followed in *Rosencrans v. United States*, 165 U.S. 257 (1897), where this Court held that a later statute which appeared to distribute jurisdiction between the divisions of the district court did not overrule a prior grant of jurisdiction. The Court declared:

> The question is a difficult one, and yet we think the true rule of construction is this: When there

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[2] *Cf., Bruns-Nordeman & Co. v. American National Bank & Trust Co.*, 394 F.2d 300 at 303-04 (2nd Cir.), *cert. denied*, 393 U.S. 855 (1968) and *General Electric Credit Corp. v. James Talcott, Inc.* and *Franklin National Bank*, 271 F. Supp. 699 (S.D. N.Y. 1966).

[3] Sutherland, *Statutes and Statutory Construction* (4th ed.) Vol. 1A, p. 245 (Section 23.15).

> are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, where Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of a subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation. . . ..

165 U.S. at 262.

In short, Congress has seen fit to establish a special privilege regarding the venue of suits against national banks. This special status would require some clear expression of congressional intent to rescind the privilege.

Finally, the statutes are not in irreconcilable conflict since it is evident that they can be made to work together.[4] It is clear that a suit could be brought against the defendant national bank in the district court in Boston, seeking the same relief which is sought in the instant action. Thus it is evident that effect can be given to the National Bank Act venue provision and the securities laws without finding an irreconcilable conflict and therefore an implied repeal.

The federal courts have consistently applied this reasoning to reject arguments to the effect that the venue provisions of the National Bank Act were impliedly repealed by later federal statutes. For example, in *Buffum v. Chase National Bank of the City of New York*, 192 F.2d 58 (7th Cir., 1951), *cert. denied*, 342 U.S. 944, (1951) the Court of Appeals for the Seventh

[4] *See Bruns-Nordeman, supra* at 304.

Circuit held that the 1948 revision of the judicial code, which contained a venue provision in 28 U.S.C. § 1391 allowing suits against a corporation wherever it is doing business, did not repeal the earlier enacted venue provision of the National Bank Act. The decision in *Buffum* followed the similar holding of the court in *International Refugee Organization v. Bank of America*, 86 F. Supp. 884 (S.D. N.Y. 1949).[5] Both cases were cited by this Court with approval in its decision in *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

The Commission suggests in its brief (p. 11), that the venue provisions of the securities laws were designed to obviate the necessity of instituting a multiplicity of suits in order to enforce the substantive provisions of the Act, thus requiring repeal of Section 94. But the desirability of obviating the necessity of a multiplicity of suits as well as of avoiding the burden of pursuing a defendant to a distant jurisdiction when such defendant transacts business in the plaintiff's jurisdiction, are considerations which antedate the provisions of the Securities and Exchange Acts and are not peculiar to them. Nonetheless, this Court in the *Langdeau* case, *supra*, specifically rejected such arguments as insufficient to outweigh the clear provisions of the National Bank Act. The Court said:

> The consequence of our decision, appellee says, is that a litigant will be unable to join two national banks in the same action in the state courts if they are located in different counties or in the federal courts if they are located in different districts. But

[5] *Cf. Fistel v. Beaver Trust Co.*, 94 F. Supp. 974 (S.D. N.Y. 1950).

> aside from not being presented by these cases, such a situation is a matter for Congress to consider. . . .
>
> Similarly, even if all of the 145 defendants may not be sued in one proceeding in Dallas County with the same facility as they may in Travis County, this, of course, is insufficient basis for departing from the command of the federal statute.

371 U.S. at 563-6.

Similarly, in *Michigan National Bank v. Robertson*, 372 U.S. 591 (1963), this Court rejected the contention that the burden of pursuing a national bank to its home state hundreds of miles away militated against the strict application of the venue provision of the National Bank Act. Plaintiffs in that case purchased house trailers in Nebraska and executed notes and lien instruments to a local dealer who in turn negotiated them to a national bank whose principal office was in Michigan. The plaintiffs alleged violations of the Nebraska Installment Loan Act and challenged the validity of the transactions and the documents executed in connection therewith. This Court held, however, that by reason of 12 U.S.C. § 94, the Michigan Bank could not be involuntarily sued in Nebraska although it was doing business there. Accordingly, the case was remanded solely for the purpose of determining whether the bank had waived its venue privilege,[6] despite the criticism of the "harsh result" by Justices Black and Douglas in their concurring opinion (372 U.S. at 595).

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[6] On remand, the Nebraska Supreme Court held that the national bank had not waived the venue of the Nebraska court. *Hills v. Burnett*, 175 Neb. 871, 125 N.W.2d 66 (1966).

In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the contention was made that the Securities Exchange Act had repealed certain provisions of the antitrust laws. The Court rejected that argument, saying:

> The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication and '[i]t is a cardinal principle of construction that repeals by implication are not favored.' Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and *even then only to the minimum extent necessary*. [Emphasis added; citations omitted.]

373 U.S. at 357.

The Court reaffirmed just last term this same standard for implied repeal, although that standard was applied to find that the antitrust laws were impliedly repealed to some extent by the securities laws. *See Gordon v. New York Stock Exchange*, ____ U.S. ____, 45 L.Ed.2d. 463 (June 26, 1975) and *United States v. National Association of Securities Dealers, Inc.*, ____ U.S. ____, 45 L.Ed.2d 486 (June 26, 1975). The Securities and Exchange Commission relies heavily on these decisions to support its contention of implied repeal respecting 12 U.S.C. § 94. In both these cases, however, this Court was confronted with a situation where the regulatory scheme envisioned by Congress simply would not work if the antitrust laws were to prevail. *See Gordon, supra*, 44 L.Ed.2d 463 at 481 and *National Association of Securities Dealers, Inc., supra*, 45 L.Ed.2d 486 at 513.

To summarize, the principal considerations urged for holding that the venue provisions of the Securities Exchange Acts should repeal *pro tanto* 12 U.S.C. § 94 are hardships to investors, multiplicity of suits, and complications of enforcement of the Securities Exchange Act. This Court has, in other contexts, rejected the consideration of multiplicity of suits and hardships to investors as reasons for overriding the specific venue limitation in the National Bank Act. *See Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963) and *Michigan National Bank v. Robertson*, 372 U.S. 591 (1963) discussed above. It is clear that all applicable substantive provisions of the Securities Acts still are available to petitioner, even though there is but one judicial district in which respondent may be sued. Thus, there does not here exist the type of irreconcilable conflict between two statutes which this Court consistently has required before finding that Congress intended to repeal the earlier enacted statute.

B. Congress Expressed no Intent, in Passing the Securities Laws, to Repeal the Venue Provision of the National Bank Act.

In *Bruns-Nordeman & Co., supra*, the Second Circuit noted that, when the 1933 and 1934 Securities Acts were passed, national banks were under extensive supervision by the Comptroller and "... were hardly envisioned as likely defendants in actions under the new Securities Laws." 394 F.2d at 304. The court referred specifically to the House Committee Report[7] showing

[7]H. Rep. No. 85, 73rd Cong., 1st Sess., 14 (1933).

that Congress expressly relied on the Comptroller when, in the 1933 Act, it exempted securities of national banks from the requirement of registering and from civil liability for fraud in their distribution. *Ibid.*

The Commission in its *amicus* brief (p. 19) attempts to rebut the Second Circuit's conclusion by referring to a 1934 report of the Senate Committee on Banking and Currency, and speculating that the court was unaware of the report.[8] This report was a general survey of problems confronting the Congress, and – unlike the House Report referred to by the Second Circuit – did not accompany or report upon any specific statute. Additionally, most of the problems discussed in that report were dealt with either by other legislation or by no federal legislation at all. For example, the Commission refers (brief, p. 20) to the Senate Report's conclusion that banks were found to have violated their fiduciary duties to depositors, stockholders and investors by such practices as improperly promoting to their depositors, who were seeking disinterested investment advice, securities in which the bank or its affiliates had a pecuniary interest. This problem, however, was handled not by the Securities Act, but by the Glass-Steagall Act.[9] *See Investment Company Institute v. Camp*, 401 U.S. 617 (1971). The Commission also refers (brief, p. 20) to the Senate Report's assertion that bank officers held numerous directorships in

[8]Sen. Comm. on Banking and Currency, Sen. Rep. No. 1455, 73rd Cong., 2d Sess. (1934).

[9]The Glass-Steagall Act is found in the Banking Act of 1933 and amendments of 1935, 12 U.S.C. § 21, *et seq.*

various public companies and often assumed the inconsistent position of representing conflicting interests when passing upon loans. No statute limits this practice, unless the facts of a particular case could be construed to be a misapplication of funds prohibited by 18 U.S.C. § 656.

That Congress was concerned with the role played by banks and bankers in the disastrous events leading up to passage of both the Securities Acts and the Glass-Steagall Act is undisputed. But it seems equally clear that Congress intended to deal with these problems by ways other than a wholesale application to banks of the provisions of the securities laws. For example, the problem of speculation fueled by margin purchases is dealt with in the Securities Act of 1934 but interestingly, not through the Securities and Exchange Commission, but through the Federal Reserve Board. *See* 15 U.S.C. § 78g and h. As Judge Friendly aptly noted, Congress exempted banks from the securities registration requirements of the 1933 Act. *Bruns-Nordeman & Co., supra*, 394 F.2d 300 at 304. Congress took the same approach in the 1934 Act exempting banks from the definition of "broker" and "dealer" and taking care to define the word "bank" itself. 15 U.S.C. § 78(a)(4)-(6). Since Congress established a separate and specific statutory scheme for dealing with banks and their securities problems, we believe that the *Bruns-Nordeman* court was entirely correct in concluding that banks were hardly envisioned as likely defendants under the securities laws being enacted to apply to non-banking companies and corporations. In any event, the regulation of banks could hardly be said to be such a fundamental purpose of the Securities Acts as to

require that the venue provision of the 1934 Act be given such a broad reading as to require repeal of the venue provision of the National Bank Act in order to effectuate the purposes of the Securities Act.

The concept that a bank such as the defendant bank in this case being privy to inside information as a lender, should be potentially liable under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) promulgated by the SEC thereunder, when its borrower makes statements regarding the same information which are false or misleading certainly was not in Congress' mind when considering the Securities Exchange Act. A bank has a strong fiduciary obligation to its own shareholders and depositors which would mitigate against publicly disputing a borrower's statements of condition. Such a course of action could weaken the borrower and possibly precipitate a default on the loan. As the Court in *Bruns-Nordeman & Co.* points out, we cannot be sure how Congress would balance such interests against those of potential securities plaintiffs, and how any such balance would impact upon the venue provisions either of the Securities Acts or of the National Bank Act. It seems clear, however, that the Congress of the early 1930's envisioned the Glass-Steagall Act and other banking statutes as governing the securities problems related to banks, and thus scarcely could have viewed the nationwide venue provisions of the Securities Acts as being of particular importance in remedying these bank-related problems.

CONCLUSION

For the above reasons, the venue provisions of the Securities Exchange Act of 1934 did not repeal, either expressly or impliedly, the venue provisions of the National Bank Act, and the judgment below should be affirmed.

Respectfully submitted,

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I authorize the filing of the above brief.

ROBERT H. BORK
Solicitor General